HAMAWANGSA KREDIT SDN BHD v. AMGENERAL INSURANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
KHADIJAH IDRIS JC
[CIVIL APPEAL NO: WA-12BNCC-5-02-2016]
7 JULY 2017

INSURANCE: *Claim – Motor insurance – Indemnity – Company bought insurance policy for motor trade plate – Vehicle stolen during test-drive – Motor trade plate not displayed on vehicle – Company's claim under policy for losses due to theft rejected by insurer – Whether insurer's liability under policy subject to motor trade plate being displayed on stolen vehicle – Whether theft due to company's negligence – Whether insurer liable to indemnify company – Whether insurer entitled to repudiate policy – Motor Vehicles (Registration and Licensing) Rules 1959, r. 21*

The appellant ('the plaintiff') ran the business of distributing and/or selling vehicles while the respondent ('the defendant') was an insurance company. The plaintiff bought a policy ('the policy') for the motor trade plate J224A ('the trade plate') from the defendant to protect the motor vehicles at its Batu Pahat Branch ('the branch'). An Audi was stolen from the branch when a customer, under the pretext of test-driving, sped off with the car when he was left alone with the engine running while the plaintiff's salesman ('SP2') was trying to obtain approval from his manager ('the theft'). Following that, the plaintiff submitted a claim under the policy for losses incurred as a result of the theft. However, the defendant rejected the claim on the ground, *inter alia*, that (i) the defendant's ability to provide compensation only arose if the trade plate was displayed on any of the plaintiff's motor vehicle; and (ii) the theft was due to the plaintiff's negligence, including leaving the Audi in the control or care of unknown persons and failing to take the car keys before leaving the Audi. This prompted the plaintiff to commence a claim against the defendant at the Sessions Court for, *inter alia*, compensation amounting to RM489,326.19. In her judgment, the Sessions Court Judge held that the defendant was (i) not liable to indemnify the plaintiff under the policy as the trade plate was not affixed to the Audi when it was stolen; and (ii) entitled to repudiate the policy as SP2 was negligent. Hence, the present appeal. In support of its appeal, the plaintiff submitted that (i) there was nothing in the policy which provided that the defendant was obligated to display the trade plate on the vehicle; and (ii) the customer was always around to see and buy the plaintiff's vehicle and no ordinary man would have expected that the customer would steal the Audi. The issues that arose for the court's adjudication were (i) whether the defendant's liability under the policy was subject to the trade plate being displayed on the Audi; and (ii) whether the theft was due to the plaintiff's negligence.

Held (dismissing appeal):

(1) The policy was issued in respect of the motor trade bearing registration number J224A. The insurance contract was not to insure the negligent act of the plaintiff. The applicability of the Motor Vehicle Rules 1959 ('the Rules') to the trade plate must be given judicial notice pursuant to s. 57(1) of the Evidence Act 1950. As long as the vehicle is in use, for the vehicle to be protected under an insurance policy which provided protection for a motor trade plate, the motor trade plate must be fixed to the said vehicle in the manner prescribed under the Rules. Rule 21 of the Rules requires a motor trade plate to be fixed in the front and the back of the motor vehicle which is being used. The motor trade plate is also required to be carried and properly fixed in the holder attached to the front plate and must be clearly visible at all times when a motor vehicle is in use. In the context of r. 21 of the Rules, it did not matter where the Audi was test-driven. Even though it was driven in the premise compound of the branch and not on a public road when it was stolen, the Audi was, at all material times, in use for test drive by the customer. (paras 23, 25 & 28)

(2) The plaintiff failed to take reasonable steps to prevent loss and damage to the Audi. There were unchallenged evidences to show that the plaintiff was negligent in dealing with the matter and this resulted in the theft. The plaintiff (i) failed to produce guidelines/procedures for the test-driving and selling of vehicles; (ii) did not provide a log/record book for test-drives; (iii) allowed the customer to test-drive the Audi without asking for his driving license; (iv) left the Audi unsupervised and the car keys unattended; (v) did not take safety measures such as stationing a guard or having a gate barrier at the branch; and (vi) failed to produce CCTV recordings of the theft. Furthermore, there was no evidence to show that the customer was a man of some standing in the society. The fact that the customer was always around to see the plaintiff's motor vehicles did not justify the plaintiff to compromise safety and security of the motor vehicles, especially since there was no security guard or barrier at the entrance/exit to stop the Audi from leaving the premise compound. (paras 31, 36 & 39)

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Malaysian Motor Insurance Pool v. Naza Motor Trading Sdn Bhd [2011] 9 CLJ 605 FC ***(dist)***

Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] 1 LNS 1416 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Syarikat Uniweld Trading v. Asia Insurance Co Ltd [1996] 3 CLJ 142 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 57(1)
Motor Vehicles (Registration and Licensing) Rules 1959, r. 21(7)
Road Transport Act 1987, ss. 22, 128

For the appellant - Abu Yazid Shayuthy; M/s Ashfar Ali & Assocs
For the respondent - Jeyaveeran S Naicker; M/s Naicker & Assocs

[Editor's note: Appeal from Sessions Court; Suit No. B52NCC-196-03-2015.]

Reported by Najib Tamby

JUDGMENT

Khadijah Idris JC:

Introduction

[1] This is an appeal filed by plaintiff against my decision dismissing plaintiff's appeal against decision of the Sessions Court Judge (SCJ) who dismissed plaintiff's claim after a full trial.

[2] Plaintiff claims against defendant for, among others, compensation amounting to RM489,326.19 for the theft of a motor vehicle insured by the defendant was dismissed by the Sessions Court.

[3] The parties herein are referred as they were before the Sessions Court.

Factual Background

[4] Plaintiff, Hamawangsa Kredit Sdn Bhd, is a private company incorporated under the Companies Act 1965 engages in the business of distributing and/or sale of luxury vehicles. Its business address is in Kuala Lumpur and has a branch in Batu Pahat, Johor (Batu Pahat Branch) which is the place where the incident which is the subject matter of plaintiff's claim and this appeal happened.

[5] Defendant is an insurance company incorporated under the CA 1965 with a business address in Kuala Lumpur.

[6] Plaintiff's pleaded case is as follows:

(a) it bought a motor trade plate insurance policy number HF-3-13-H006485 Motor Trade Policy (Road Risk) Schedule (Motor Trade Insurance Policy) for trade plate number J224A from defendant to protect the motor vehicles at the Batu Pahat Branch. Validity period of the Motor Trade Insurance Policy ran from 21 May 2013 to 20 May 2014;

(b) on 29 May 2013 an Audi Q7 SE TFSI Quattro chassis number WAU ZZZ 4L1BD017484 (the Audi) was stolen by two individuals from the Batu Pahat Branch. The circumstances under which the Audi was stolen:

(i) an appointment was made by a man (customer) who wanted to see an Audi on that day. The customer was allowed to test drive the Audi only in the premise compound of the Batu Pahat Branch at the parking lot;

(ii) the customer however insisted that he be allowed to test drive the car on the road outside the premise compound of the Batu Pahat Branch;

(iii) plaintiff's employee/agent who attended to the customer informed him that approval from the manager need to be obtained and that a trade plate need to be hanged on the outside of the Audi before the Audi can be driven outside the premise compound;

(iv) the plaintiff's employee had asked another of plaintiff's employee to wait in the Audi together with the customer while he went to the manager's office to get the trade plate. However before the other employee could do just that the customer fled away with the Audi. The plaintiff's employee who attended to the customer was moving towards the manager's office when the Audi was driven away;

(c) A police report was lodged on the same day. Plaintiff submitted a claim under the insurance policy for losses incurred as a result of the theft but defendant rejected the claim.

Defendant's Defence

[7] Defendant admitted issuing the Motor Trade Insurance Policy for the trade plate number J224A owned by plaintiff. The protection under the said insurance policy is subject to terms and conditions contained therein, the certificate of insurance and the Motor Trade Policy (Road Risk).

[8] Defendant further pleaded:

(a) the indemnity given under the trade plate is subject to plaintiff's obligation to provide a full and frank disclosure of information at the time the Motor Trade Insurance Policy was applied;

(b) defendant's liability to provide compensation only arise if the trade plate is displayed on any of plaintiff's motor vehicle;

(c) defendant alleged the theft of the Audi was due to plaintiff's negligence, including leaving the Audi in the control or care of unknown persons and fail to take the car keys before leaving the Audi;

(d) defendant disputed the amount of compensation claims and put the plaintiff to strict proof. Defendant alleges the claim amount to unjust enrichment.

Decision Of The SCJ

[9] In her judgment the SCJ:

(a) held that defendant is not liable to indemnify plaintiff under the policy HF-3-13-H-006485 because the trade plate was not affixed to the Audi at the time the Audi was stolen; and

(b) found the plaintiff's employee, SP2 the salesman who attended to the customer, was negligent and by virtue of condition 7 of the Motor Trade Policy the defendant is entitled to repudiate the insurance policy.

Grounds Of Appeal

[10] Plaintiff contends the SCJ erred in law and in fact when she held:

(a) Defendant's liability under the Motor Trade Insurance Policy is subject to the motor trade plate being displayed on the Audi. In this respect plaintiff contends:

(i) on that fateful day the Audi was not in use. This is because the Audi was still in the compound of the premise of the Batu Pahat Branch, it is not on the road outside the said compound or being driven out from the compound. As such the issue of fixing the motor trade plate on the front and at the back of the Audi as required under r. 21(7) of the Motor Vehicles (Registration and Licensing) Rules 1959 (Motor Vehicles Rules 1959) does not arise;

(ii) there is nothing in the Motor Trade Insurance Policy which provides that defendant's obligation is subject to the trade plate being displayed on a motor vehicle which is stolen or damage;

(b) the theft was due to plaintiff's negligence *via* its employee, SP2. In this respect plaintiff contends the Sessions Court found the customer was always around to see and buy plaintiff's motor vehicle. Therefore plaintiff cannot be held to be negligent when the customer was allowed to be alone in the Audi with the engine running. No ordinary man would have expected the customer will steal the Audi.

Issues

[11] The issues to be determined are:

(a) whether defendant's liability under the policy HF-3-13-H-006485 is subject to the motor trade plate J224A being displayed on the Audi; and

(b) whether the theft of the Audi was due to plaintiff's negligence.

A **The Law**

[12] In so far as the function and appellate power of the court I am guided by the principles established in a string of authorities:

(a) In *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163 it was held:

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> [2] It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the factual findings of the Court below be disturbed by the appellate Court unless it appears that those findings are clearly wrong; and it is even more undesirable to do so where the conclusions reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the Court which has seen them and judged their honesty and accuracy.
>
> [3] However, there is clear authority that a distinction can be drawn between the finding of a specific fact which depends upon the credibility of witnesses, and a finding of fact which depends upon interferences drawn from other facts. In the latter case, an appellate Court will more readily interfere with the trial judge's findings of fact and form an independent opinion. Thus, in cases where there is no question of the credibility or reliability of any witness, or where the point in dispute is the proper inference to be drawn from proved facts, an appeal Court is generally in as good a position to review and evaluate the evidence as the trial Judge ...

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(b) in *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 1 LNS 1416 the court held:

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> [4] Both parties began their submissions with the clear understanding that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts in the trial judge. They cited this court in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 CA; [1996] 4 CLJ 545 CA. This general principle was adopted by this court in *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 CLJ 19 and other cases. It is clear it is a general principle and that there are exceptions when appellate intervention is necessary to ensure justice is done. In the cases regularly cited, the terms "intervene" and "interfere" are used interchangeably. A more precise use of terminology would remove much unnecessary confusion and argument. It is more precise to say that an appellate court will intervene to correct an injustice when it is shown to have occurred in the trial court, but it would be an interference otherwise.
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> [5] The following from the dissenting speech of Lord Pearce in *Onnasis & Anor v. Vergottis* [1968] 2 Lloyds Rep 403, 430 was quoted in *Sivalingam (supra)* as containing a valuable reminder:

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> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: But the fact that the right party seems to have succeeded in the Court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

(c) In the case of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 it was held:

> It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. However the appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself, that one may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

Court Findings

[13] Plaintiff's cause of action is premised on the Motor Trade Insurance Policy issued by defendant. It is not disputed that there was a valid and subsisting contract of insurance between the parties and that plaintiff's claim for indemnity arose out of the said insurance contract. Therefore the rights and obligations of the parties are subject to the terms and conditions governing the said insurance contract. From the evidence of the witnesses, the insurance contract consists of several documents:

(a) The Motor Trade Insurance Policy issued by defendant in favour of plaintiff. The Motor Trade Insurance Policy was marked as D12 (at p. 342 rekod rayuan jilid 2). Such insurance policy was issued in respect of a motor trade plate bearing registration number J224A. The Motor Trade Insurance Policy number is HF-3-13-H-006485, it is a comprehensive coverage and valid for a period from 21 May 2013 to 20 May 2014. Total amount premium paid/to be paid was RM5,191.61;

(b) Certificate of insurance exhibited and marked as D 13 (p. 343 rekod rayuan jilid 2). The number of the certificate is JVB-6958243 20-01. The index mark and registration number of vehicle is stated as J224A and

plaintiff is named as the policyholder. The said certificate set out, among others, persons or classes of persons entitled to drive, limitations as to use and duty as owner of the vehicle; and

(c) Motor Trade Policy (Road Risk) exhibited and marked as D 14 (pp. 344 - 348 rekod rayuan jilid 2) which essentially provides defendant's obligation to indemnify the plaintiff for loss or damage to the vehicle. The said document set out, among others, the circumstances under which defendant is liable to indemnify plaintiff and the general exception thereto.

[14] Based on D 12, the Motor Trade Insurance Policy is not in respect of any motor vehicle with certain registration number. As the name suggests, it is in respect of a motor trade plate and in the instant case it is for a motor trade plate registration number J224A. DW2, the vice president - personal line of defendant and oversee the insurance underwriting department, testified the Motor Trade Insurance Policy is similar to the normal passenger car insurance policy. The Motor Trade Insurance Policy will only be attached with liability if a vehicle is driven with the trade plate J224A being displayed on the front and back of a motor vehicle.

[15] When asked by plaintiff's counsel which provision in the Motor Trade Insurance Policy, Certificate of Insurance and Motor Trade Policy (Road Risk) which states the motor trade plate J224A must be displayed on the Audi for liability to be attached, DW1 referred to the following provision in the Motor Trade Policy (Road Risk) (at p. 347 of Rekod Rayuan Jilid 2):

> DEFINITION OF WORDS HIGHLIGHTED IN THE POLICY
>
> ...
>
> 3. Your Vehicle refers to the Vehicle, its standard factory-fitted accessories and any other additional accessories as described in the Policy Schedule.

[16] DW1 testified the vehicle as described in the policy schedule which is the Motor Trade Insurance Policy is the trade plate number J224A. It must be noted this particular evidence is not challenged by plaintiff. What is of issue to plaintiff is that there is no provision in the Motor Trade Insurance Policy, Certificate of Insurance and Motor Trade Policy (Road Risk) which specifically states liability under the Motor Trade Insurance Policy will only arise if the trade plate J224A is affixed to a vehicle.

[17] Defendant *via* DW1 relies on r. 21 of the Motor Vehicles Rules 1959 which states:

> 21. Motor Trade Licences
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> …
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> [7] The plates shall be fixed in the front and the back of the motor vehicle which may be in use, in the manner prescribed by these Rules with respect to the registration number and shall be carried at all times when a vehicle

is in use under such motor trade licence. The licence without any alteration thereof or addition thereto shall be carried properly fixed in the holder attached to the front plate so as to be clearly visible at all times by daylight from the front of the vehicle at all times when the vehicle is in use under that licence.

[18] While it is true the Motor Trade Insurance Policy did not specifically refer to r. 21 of the Motor Vehicles Rules 1959, it must be borne in mind that the said policy document is to be read with other documents namely the certificate of insurance and the Motor Trade Policy (Road Risk). In this respect DW1 testified the RTA is applicable to the Motor Trade Insurance Policy *via* the certificate of insurance which made reference to "Akta Pengangkutan Jalan Raya 1987" which is the Road Transport Act 1987 (RTA).

[19] The RTA makes provision for, among others, the regulation of motor vehicles and for the protection of third parties against risks arising out of the use of motor vehicles. Section 22 RTA provides for application for motor trade licence. The said provision states:

Motor vehicle trade licences

22. (1) If any person, being a manufacturer or repairer of or dealer in motor vehicles, makes an application in the prescribed manner to the Director of the registration area in which his business premises are situated that he may be entitled, in lieu of taking out a licence under this Part in respect of each motor vehicle used by him, to take out a general licence in respect of all motor vehicles used by him, the Director may, subject to any conditions which may be prescribed, grant to such person a licence (in this Act referred to as a "motor trade licence") on payment of the prescribed fee.

(3) Nothing in this section shall operate to prevent a person entitled to take out a motor trade licence from holding two or more such licence.

(4) A motor trade licence shall not be granted until the applicant has produced evidence, to the satisfaction of the Director, that during the period of validity of such licence there will be in force such policy of insurance or such security as complies with the requirements of Part IV in respect of the use of motor vehicles in accordance with such licence.

(5) A motor trade licence shall not be assigned or transferred.

(6) Subsections 17(2) and (5) shall apply to a motor trade licence as they apply in respect of a motor vehicle licence.

[20] The Motor Vehicles Rules 1959 was legislated under s. 57 of the Road Transport Ordinance 1958 (RTO) which was repealed by the RTA. Section 128 of the RTA provides all subsidiary legislations made under the RTO insofar as they do not relate to the licensing of commercial vehicles shall be

deemed to have been made under the RTA and shall continue to remain in force until amended or revoked. As it is now the Motor Vehicles Rules 1959 in respect of motor trade licence remain in force.

[21] In this respect, I am in agreement with the defendant's submission that the applicability of the Motor Vehicles Rules 1959 to the motor trade plate must be given judicial notice pursuant to s. 57(1) of the Evidence Act 1950. In so far as the law relating to motor trade plate is concerned, the SCJ referred and applied r. 21 of the Motor Vehicles Rules 1959. The said rule (reproduced *verbatim* in para. 17 above) requires motor trade plates to be fixed in the front and the back of the motor vehicle which is being used. The motor trade plates is also required to be carried and properly fixed in the holder attached to the front plate and must be clearly visible at all times when a motor vehicle is in use. In respect of the motor trade plate the SCJ made the following finding:

> Adalah jelas pada setiap ketika jika Plaintif berkehendakkan Defendan menanggung rugi atas apa-apa kerosakan dan/atau kehilangan pada kenderaan yang telah dilindungi melalui polisi plet perdagangan itu mesti menggantungkan plet perdagangan itu pada kenderaan itu pada ketika hendak digunakan.

[22] The issue to be determined is whether the requirement for the motor trade plate to be fixed to a motor vehicle (in the instant case, the Audi) is a prerequisite to defendant's obligation to indemnify plaintiff for the theft of the Audi.

[23] In this respect, as submitted by defendant, the approach to be adopted is established in *Syarikat Uniweld Trading v. The Asia Insurance Co Ltd* [1996] 3 CLJ 142; [1996] 2 MLJ 160:

> (1) An insurance policy should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application;
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> …
>
> (3) In interpreting any clause of an insurance policy, one must bear in mind the commercial object or function of the clause and its apparent relation to the contract as a whole. In adopting this approach, it becomes apparent that the literal meaning of the clause in the insurance policy must necessarily yield to business sense so that an ambiguity in wording could be resolved.

[24] In *Syarikat Uniweld Trading (supra)* the insurer relied on the exemption clause excluding liability "… in respect of injury or damage caused by or in connection with or arising from fire …" although the policy expressly provided that the insurer will indemnify the insured in respect of accidental personal bodily injury to third parties and accidental damage to property

belonging to third parties caused by the fault or negligence of the insured and/or ant person in the insured's service whilst engaged in the insured's business. The court found, based on the insurance contract, the main purpose of the insurance policy was to insure against damages arising from negligent acts by the insured. The court held:

> The literal meaning of words in the insurance policy must not be allowed to prevail where it would produce an unrealistic and generally unanticipated result as envisaged in *M'Cowan v. Baine & Johnston & Ors* [1891] AC 401 at p 403; *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at p 597; and *Westminster Fire Office v. Reliance Marine Insurance Co* (1903) 19 TLR 668. An unanticipated result in the context of the present appeal would be to absolve the respondent as an insurer from liability on the chief risks sought to be covered by the insurance policy. Thus, in an insurance policy where the main purpose was to insure against damages arising from negligent acts by the insured, it was held that a condition that 'the insured shall take reasonable precautions' could not be so construed that every negligent act was a breach of it (*Fraser v. Furman (BN) (Production), Miller Smith & Partners (A Firm) Third Party* [1967] 3 All ER 57; and *Cornish v. The Accident Insurance Co Ltd* (1889) 23 QBD 453). It is not out of place to mention that in interpreting any clause of an insurance policy, one must bear in mind the commercial object or function of the clause and its apparent relation to the contract as a whole (*Kearney v. General Accident Fire and Life Assurance Corp* [1968] 2 Lloyd's Rep 240; and *L Schuler AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235 at pp 251 and 265). In adopting this approach, it becomes apparent that the literal meaning of the clause in the insurance policy must necessarily yield to business sense so that an ambiguity in the wording can be resolved.

[25] In the instant case the Motor Trade Insurance Policy was issued in respect of the motor trade bearing registration number J422A. The insurance contract is not to insure the negligent act of the plaintiff. Rule 21 of the Motor Vehicles Rules 1959 clearly specifies that the motor trade plate shall be fixed in the front and the back of the motor vehicle which may be in use. The motor trade plate shall be carried at all times when a vehicle is in use under such motor trade licence. Therefore as long as a vehicle is in use, for the vehicle to be protected under an insurance policy which provides protection for a motor trade plate, the motor trade plate must be fixed to the said motor vehicle in the manner prescribed under the said Rule. As such, in order for the Motor Trade Insurance Policy in respect of motor trade plate J224A to be operative, the trade plate must be fixed to the Audi. Taking into account the insurance contract is to protect the motor trade J224A such position is the most sensible approach and consistent with sound commercial consideration, not to mention in compliance with the RTA and in particular r. 21 of the Motor Vehicles Rules 1959.

[26] It is apparent from the evidence adduced by SP2, the salesmen who attended to the customer, that on the fateful day the Audi was allowed to be used by the customer to test drive the Audi within the premise compound of the Batu Pahat Branch. This is apparent from SP2's testimony:

At pp. 105 and 106 of the Rekod Rayuan Jilid 1:

PD So tadi, ok kembali semula bagaimana kecurian itu berlaku, kamu telah kata bahawa 2 orang ini telah berjumpa dengan Manager, betul?

SP2 Betul.

PD Ok selepas itu Manager telah menghantarkan boleh test drive?

SP2 Tetapi dalam kawasan kita.

PD Dalam kawasan sahaja?

SP2 Yes.

PD So selepas dia test drive dengan kamu berada di kereta semasa test drive?

SP2 Saya ada.

PD Dia test drive seorang ke ataupun ada?

SP2 Seorang. Lagi satu orang dekat luar.

PD Kamu?

SP2 Saya dekat luar.

PD Tiada dalam kereta?

SP2 Tiada dalam kereta.

PD Ok. So dia test drive di dalam kompaun and kamu berada di luar?

SP2 Ya.

PD Ok. So selepas itu dia kata dia mahu ambil keluar, betul?

SP2 Ya betul.

At page 108 and 109 of the Rekod Rayuan Jilid 1 -

PD Ok sekarang saya pergi ke lokasi Hamawangsa.

SP2 Ok.

PD Hamawangsa merupakan satu bangunan tunggal, betul?

SP2 Yes.

PD Dengan tanah?

SP2 Tanah belakang.

…

PD Belakang ialah car yard betul? Semua kereta dipark belakang betul? A

SP2 Ya betul.

PD So di mana dia test drive?

SP2 Dia berada di belakang.

PD Car yard? B

SP2 Ya. Di belakang lepas itu dia menghadap ke depan.

…

PD Dari back yard pergi ke depan? C

SP2 Yes.

PD Ok. So lepas itu kamu suruh kawan kamu untuk jaga kereta, betul?

SP2 Yes.

PD Ok. Yang kawan kamu itu adakah dia seorang salesman? D

SP2 Salesman juga.

PD Seorang salesman?

SP2 Yes.

PD Ok. So semasa dia semakin mendekati kereta itu kamu telah pergi jumpa Manager betul? E

SP2 Ya, betul.

PD So setuju dengan saya memang ada satu waktu kereta itu tidak diawasi betul? Sebab dia semakin mendekati kereta dan kamu sudah menuju ke office, betul? F

SP2 I punya kawan sudah

PD Tidak, setuju atau tidak?

SP2 Tidak.

PD Saya cadangkan memang ada satu gap di mana kereta tersebut Audi tidak diawasi kerana kamu menuju ke office dan dia menuju ke kereta tersebut. G

SP2 Ya.

PD Setuju? H

SP2 Ya.

[27] Based on SP2's testimony, plaintiff's contention that the Audi was not in use at that point in time is misconceived. It is indeed true that the Audi was driven in the premise compound of the said branch and that the Audi was not on public road when it was stolen but it was at all material time in I

A use for test drive by plaintiff's customer. If after testing the Audi within the premise compound the customer is satisfied with the Audi he could have placed an order to purchase without having to test drive the Audi outside the premise compound of the Batu Pahat Branch.

B **[28]** I am of the view, in the context of r. 21 of the Motor Vehicles Rules 1959, it does not matter where the Audi was test driven. What matters and what is required under the said rule is for the motor trade plate J224A to be fixed to the Audi in the manner prescribed under the said r. 21 when the Audi is in used.

C **[29]** Under the circumstances I am of the view the SCJ's ruling that the motor trade plate must be fixed to the Audi for liability to be attached is not plainly wrong and ought not to be disturbed. Such ruling is consistent with the provisions of the RTA, Motor Vehicles Rules 1959, the provisions of the Motor Trade Insurance Policy, Certificate of Insurance and Motor Trade Policy (Road Risk).

D *Whether Theft Of The Audi Was Due To Plaintiff's Negligence Via Its Salesmen SP2*

[30] The issue of plaintiff's negligence in the theft of the Audi is significant due to the following conditions:

E (a) the Motor Trade Insurance Policy provides:

> Subject to IMPORTANT NOTICE: Your duty as the Owner of the vehicle as attached
>
> …

F > Limitations as to Use: As described in the Certificate of Insurance

(b) the Certificate of Insurance states:

> "IMPORTANT NOTICE: Your duty as the Owner of the vehicle. Failure to comply to the below may result your claim to be declined.

G > …
>
> (6) the Insured shall take all reasonable steps to safeguard the Motor Vehicle from loss or damage

(c) the Motor Trade Policy (Road Risk) stipulates:

H > 7. OTHER MATTERS
>
> This policy will only be operative if:-
>
> …
>
> (c) You have taken all reasonable precautions to safeguard Your Vehicle from loss or damage

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[31] There is evidence to show that plaintiff was negligent in dealing with the matter and this resulted in the theft of the Audi. Negligent conduct on the part of the plaintiff as identified by defendant in its written submission were:

(a) failure to produce guidelines/procedures - selling and test driving a vehicle (see SP2's testimony at pp. 102, 103 rekod rayuan jilid 1);

(b) no log/record book on test drives (see SP2's testimony at p. 103 rekod rayuan jilid 1);

(c) allowed to test drive the Audi without production of the customer's driving licence (see SP2's testimony at pp. 103 - 104, 114 rekod rayuan jilid 1);

(d) the Audi's car keys was left unattended and SP2 was not seated in the Audi at the material time (see SP2's testimony at pp. 142 - 143 rekod rayuan jilid 1);

(e) the Audi was left unsupervised (as can be gathered from SP2's testimony throughout his cross-examination);

(f) no safety precautions - guard and gate barrier at the plaintiff's premise (see SP2's testimony at pp. 110 - 111, 114 - 115 rekod rayuan jilid 1);

(g) no cctv recordings that the Audi was stolen (see SP2's testimony at p. 118 rekod rayuan jilid 1);

(h) no road tax was displayed on the Audi at the material time (see SP2's testimony at p. 119 rekod rayuan jilid 1); and

(i) no inventory list/photographs of the Audi within the plaintiff's records (see SP2's testimony at p. 120 rekod rayuan jilid 1).

It is important to note that the above evidence was never challenged by the plaintiff's counsel during re-examination of SP2.

[32] Plaintiff contends the circumstances under which theft of the Audi occurred is similar with the circumstances of theft of a Mercedes Benz E320 in *Malaysian Motor Insurance Pool v. Naza Motor Trading Sdn Bhd* [2011] 9 CLJ 605. In that particular case the Federal Court agreed with finding of the Court of Appeal that there was no evidence that the plaintiff was courting with danger. The Federal Court ruled:

> [15] As regards the application of the provision of Clause 8 of the General Exceptions to the Insurance Policy relating to the offence of cheating in the present case, we are of the view that an exception clause is not operative unless if the events leading to the loss of the motor vehicle can be regarded as the proximate cause of the loss or the inevitable cause of the loss. (See *The Law of Insurance Contracts* (4th edn 2002) by Malcolm A Clarke para 19-1 C2 at p. 583). On this point we also refer to the case of

A *Reischer v. Borwick* [1894] 2 LR 548 wherein on the facts of the case the insurance policy covered "only against the risk of collision (as per clause attached), and damage received in collision with any object, including ice". The clause attached related to collision with other vessels and the policy did not include "perils of the sea". It was decided by Lindley LJ at p. 551 that:

B

> ... The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other, each was as much a proximate cause of her
C sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy.

In the present case the proximate cause of the loss or the inevitable cause of the loss of the motorcar is in fact due to the act of theft by the said
D customer and not cheating.

[33] The Federal Court found there is no single element to show that the plaintiff's sales representative was deliberately courting danger. The court was of the view the plaintiff's sales representative was deceived into leaving the car with a view to oblige the customer as a potential buyer. No
E reasonable man would have foreseen that such a potential buyer who had portrayed himself as a man of some standing (apparently the customer introduced himself as a Dato' Ahmad Rosli Bachik and that he wanted to buy the motorcar) in society would have acted in such a manner. The court ruled the plaintiff had not acted recklessly.

F **[34]** The above facts can be distinguished from the instant case. In the instant case SP2 himself testified that he was not with the customer in the Audi when the Audi was driven by the customer. At all material time SP2 was outside the Audi. Although the test drive was conducted within the premise compound of the Batu Pahat Branch, allowing the customer to be
G behind the wheel all by himself (or with another individual who had came along with the customer) and in possession and full control of the Audi at all material time, SP2 was obviously courting with danger. This is especially so when SP2 himself testified that there were no security guard and barrier at the gate which is always open. Reproduced below is SP2's testimony:

H At pp. 110 and 111 of the rekod rayuan jilid 1:

SP2 Ok.

PD You kejar 1 jam, ok. Mesti sebuah syarikat macam ini memang ada pengawal, guard betul?

I SP2 Malam.

PD Malam? Pagi tiada guard?

SP2 Pagi tiada.

PD Setuju sebuah syarikat macam ini dengan kereta-kereta yang total value mungkin berjuta ringgit patut ada guard? A

SP2 Itu saya tidak tahu. Itu saya punya boss.

PD Setuju atau tidak patut ada guard?

SP2 Saya tidak tahu. B

PD Setuju?

SP2 Saya tidak tahu.

PD Tidak tahu ke tidak setuju?

SP2 Tidak tahu. C

At pp. 114 and 115 of the rekod rayuan jilid 1:

SP2 Ok.

PD Ok. Tadi kamu kata memang you setuju bahawa ada gap di mana kamu telah pergi ke dalam showroom dan kawan kamu telah kembali datang ke kereta untuk menjaga kereta betul? D

SP2 Ya.

PD Ok dan kamu kata memang tiada guard betul?

SP2 Ya. E

PD Ok. Itu gate bearier pun tiada?

SP2 Biasa itu gate semua buka.

PD Bukan. Ada atau tiada gate bearier?

SP2 Ada. F

PD Ada gate bearier?

SP2 Ya.

PD So macam mana kereta itu telah daripada gate bearier?

SP2 Bearier? G

PD Ya.

SP2 Bearier tiada. Ada gate. Tetapi sentiasa buka.

[35] Plaintiff contends since the SCJ made the finding: H

> "pelanggan" itu juga merupakan antara beberapa orang pelanggan Plantif yang sentiasa hadir jika berminat untuk melihat dan membeli kenderaan Plaintif

the plaintiff could not be held to be negligent when SP2 allowed the customer to be in the car alone with the engine running. This is because, based on *Malaysian Insurance Pool (supra)*, no reasonable man would have foreseen that the customer will steal and fled away with the Audi. I

[36] With respect I do not agree. In the first place, there is no evidence to show the customer was a man of some standing in the society. Secondly the fact that the customer was always around to see/inspect plaintiff's motor vehicles does not justify plaintiff to compromise safety and security of the motor vehicles especially when SP2 is well aware there is no security guard or barrier at the entrance/exit gate to stop the Audi from leaving the premise compound.

[37] Plaintiff is suggesting that it is all right for them to allow the customer to have full control and possession of the Audi since they have known the customer who is said to have always been around the premise to test drive plaintiff's motor vehicle which is of interest to him. However there is no evidence to corroborate SP2's assertion that that the customer was allowed, in previous occasions, to test drive plaintiff's motor vehicles within or outside the premise compound of the Batu Pahat Branch. On the contrary, SP2 testified for the five months (prior to the theft of the Audi) he has worked as a salesman with plaintiff he has not given any customer to test drive any motor vehicles (see SP2's testimony at p. 133 rekod rayuan 1). Even if there is such evidence I do not think it is justified for SP2 to allow the customer to handle the Audi by himself without proper supervision. As an employee of the plaintiff and being entrusted with the plaintiff's property (the Audi) it is SP2's duty to protect the Audi from damage or loss at all times.

[38] The SCJ in her judgment made the following finding of fact:

> Di dalam tindakan di hadapan Mahkamah, 'pelanggan' tersebut berada berseorangan di dalam kereta dan SP2 berada di luar kereta. Kereta ditinggalkan dalam keadaan enjin yang dihidupkan sementara SP2 berjalan ke arah dewan pameran untuk mengambil plet perdagangan tersebut. Rakan SP2 yang diminta mengawasi kenderaan itu juga tidak berada di dalam kenderaan sebaliknya berada di hadapan dewan pameran.
>
> Kenderaan itu dibenarkan untuk dipandu uji sahaja dengan kehadiran wakil Plaintif di dalam kenderaan itu, namun di dalam kes ini wakil Plaintif tidak berada di dalam kenderaan tetapi berada di luar kenderaan dalam keadaan enjin kereta dihidupkan. 'Pelanggan' itu juga merupakan antara beberapa orang pelanggan Plaintif yang sentiasa hadir jika berminat untuk melihat dan membeli kenderaan Plaintif.
>
> SP2 sepatutnya meminta rakannya untuk duduk di dalam kereta itu memandangkan beliau akan meninggalkan pelanggan itu bersama-sama dengan kenderaan itu untuk mengambil plet perdagangan yang berada di dalam dewan pameran. SP2 juga sepatutnya mematikan enjin kenderaan dan mengambil kunci sebelum meninggalkan kenderaan itu.
>
> Adalah jelas tindakan SP2 ini mengundang padah apabila dengan mudahnya kenderaan itu dibawa lari.

[39] Taking into account the evidence in totality I am of the view that the plaintiff had failed to ensure reasonable steps taken to prevent loss and damage to the Audi. Plaintiff, based on the evidence adduced, has acted recklessly. The SCJ was right in arriving at such finding and I do not see any justification to intervene in such finding of facts. Since the court found defendant is not liable to indemnify the losses suffered by plaintiff arising out of the theft of the Audi, the issue of damages does not arise.

Conclusion

[40] Premised on the reasons stated above plaintiff has failed to prove its case on balance of probabilities. The plaintiff's appeal was accordingly dismissed.